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IN THE

Supreme Court of the United States

October Term, 1959

No. [redacted] 29

GIACOMO REINA,

Petitioner,

—against—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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July, 1960.

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TABLE OF CONTENTS

AUTHORITIES CITED

Cases

Statutes

Supreme Court Rules

Constitution of the United States

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BRIEF FOR PETITIONER

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit, affirming the judgment of the United States District Court for the Southern District of New York is reported in 273 Fed. 2d 234 (R. 38-40).[1] The opinion of the United States District Court for the Southern District of New York, adjudging the petitioner to be in contempt of Court is cited as *In re Giacomo Reina*, 170 F. Supp. 592 (R. 29-34).

[1] Numerals in parentheses preceded by the letter R. refer to page numbers of the Transcript of Record.

Jurisdiction

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28 U. S. C., Section 1254 (1) on the ground that review by the Supreme Court by a writ of certiorari is sought of a judgment of affirmance on appeal of the United States Court of Appeals for the Second Circuit.

Certiorari was sought on the grounds that the United States Court of Appeals for the Second Circuit has decided an important question of Federal Law which should be clarified and made more definite and certain; has decided a Federal question of substance not theretofore determined by this Court; and that the subject matter of this petition concerns constitutional questions concerning which this Court in the light of events, and applications of an earlier decision of this Court (*United States* v. *Murdock*, 284 U. S. 141, 76 L. ed. 210, 52 S. Ct. 63 (1931)) in Federal criminal investigations and litigations, strongly suggests the advisability of a reexamination by this Court of the position formerly taken by it in the *Murdock* case.

The said judgment of affirmance of the United States Court of Appeals for the Second Circuit was entered on the 30th day of December, 1959 (R. 40). Thereafter, and on the 27th day of January, 1960, within the thirty day period specified by Rule 22 (2) of the Supreme Court Rules the petition for a writ of certiorari was filed with the Clerk of the Supreme Court of the United States. Certiorari was granted on April 4th, 1960, 362 U. S. 939, 4 L. ed. 2d 769 (R. 41).

Constitutional Provisions and Statutes Involved

The petitioner was prosecuted in the United States District Court for the Southern District of New York pursuant to Title 18 of the United States Code, Section 401 (3).

Constitution of the United States:

> "AMENDMENT V—CAPITAL CRIMES; DUE PROCESS
>
> No person shall be held to answer for a capital, or otherwise infamous crime, * * * nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * * "

Title 18, United States Code, Sec. 401:

> "Sec. 401. Power of court
>
> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as * * *
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701."

(The Immunity Provision of the Narcotic Control Act of 1956)

Title 18, United States Code, Sec. 1406:

> "Immunity of Witnesses
>
> Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand

jury or court of the United States involving any violation of—

(1) any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,

(2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U. S. C., Sec. 174), or

(3) the Act of July 11, 1941, as amended (21 U. S. C., sec. 184a), is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section. Added July 18, 1956, C. 629, Title II, §201, 70 Stat. 574."

Questions Presented for Review

1. (A) Does the immunity provision of the Narcotic Control Act of 1956 (Title 18, Section 1406, United States Code), grant immunity from state prosecutions?

1. (B) If the aforementioned immunity provision does not grant immunity from State prosecutions, is said immunity coextensive with the privilege against self-incrimination under the Fifth Amendment of the Constitution of the United States, and in deciding this question, should not the Supreme Court of the United States re-examine the position it took in *United States* v. *Murdock*, 284 U. S. 141, 76 L. ed. 210, 52 S. Ct. 63?

2. On the facts of the present proceeding, was it not incumbent upon the Government to have made the petitioner a firm offer to excuse or remit any unserved portion of the earlier Federal conspiracy sentence that he was then serving and any unpaid fine or forfeiture imposed therein which penalties were based upon the same matters that he was questioned about before the Grand Jury in this proceeding under the purported grant of immunity of the aforementioned Federal Statute, before petitioner could be held in contempt of Court?

3. Was not petitioner denied due process of law by the failure of the District Court to inform him as to the nature of the immunity granted pursuant to Title 18, United States Code, Section 1406, before adjudging petitioner to be in contempt of Court?

4. Upon the facts herein was not the sentence of the petitioner, to two years imprisonment for contempt of court, excessive and an abuse of discretion?

Concise Statement of the Case

The contempt proceeding which resulted in the judgment of conviction herein was brought in the United District Court for the Southern District of New York pursuant to Title 18 of the United States Code, Section 401 (3) and arose out of the petitioner's refusal to testify before a Grand Jury and his invoking his privilege against self-incrimination on his being asked questions before said Grand Jury (R. 2-7, 8, 9, 12-14, 15, 16) after the aforesaid United States District Court (Edelstein, *J.*) by order dated December 17, 1958, directed him to so testify and which order purported to grant the petitioner immunity pursuant to Title 18 of the United States Code, Section 1406 as amended (R. 10-11).

At the hearing on the contempt proceeding held on the 22nd day of January, 1959, before Hon. Archie O. Dawson, United States District Judge, (R. 14-29) the petitioner opposed the Government's motion to punish him for contempt on the grounds that Title 18, Section 1406 of the United States Code is in violation of the Fifth and Fourteenth Amendments of the United States Constitution in that it does not provide the broad immunity contemplated by said amendments to the Constitution and that several of the questions propounded to the petitioner before the Grand Jury were not within the context of the meaning of the said Statute as enacted (R. 20-22).

By opinion dated January 29, 1959, the petitioner was found to be in contempt of Court, the District Court following the rationale of the decision of *United States* v. *Murdock, supra;* (R. 29-34). The petitioner was sentenced on said contempt to a term of imprisonment of two years with

a 60 day purge clause, said sentence to commence at the expiration of a sentence that petitioner was then serving.[2] Said opinion was reduced to judgment on the 2nd day of February, 1959 (R. 36-37).

The judgment of conviction was unanimously affirmed on appeal by the United States Court of Appeals for the Second Circuit (R. 38-40).

SUMMARY OF ARGUMENT

POINT I

THE IMMUNITY PROVISION OF THE NARCOTIC CONTROL ACT OF 1956 IS NOT COEXTENSIVE WITH THE PRIVILEGE AGAINST SELF-INCRIMINATION (U. S. CONST, AMEND. V) THAT IT SEEKS TO REPLACE AND IS THEREFORE UNCONSTITUTIONAL.

A

THE NARCOTIC CONTROL ACT OF 1956 DOES NOT GRANT IMMUNITY FROM PROSECUTION BY THE STATE

Point I(A) deals with construction of the extent of the Narcotic Control Act of 1956, the petitioner maintaining

---

[2] At the time of the contempt proceeding the petitioner was serving a sentence of 5 years imprisonment plus a fine of $10,000, for the crime of conspiracy to violate the Narcotic Laws of the United States (Title 21, United States Code, Secs. 173 and 174, Title 26, United States Code, Secs. 2553(a), and 2554(a) and 2606, and Title 18, United States Code, Sec. 371). Judgment was imposed in the United States District Court for the Southern District of New York on the 24th day of April, 1956 and petitioner completed service of this sentence at a date subsequent to the contempt proceedings herein on the 21st day of November, 1959, he having been credited with time spent in the Federal House of Detention since March 21, 1956, pending imposition of sentence. See *U. S.* v. *Reina*, 242 F. 2d 302; cert. denied sub. nom. *Maccio* v. *U. S.*, 354 U. S. 913, 1 L. ed. 2d 1427, 77 S. Ct. 1294.

that said Act cannot grant immunity from prosecutions by the State as the exercise of police power, more particularly enforcement of State narcotic laws, is a subject matter traditionally regulated by the respective States and is thus protected by U. S. Const. Amend. X.

POINT I

B

This Court Should Reexamine the Position That It Took in United States v. Murdock, supra, With a View to Reversing the Rationale of the Murdock Decision Which Is Destructive of the Constitutional Privilege Against Self Incrimination.

Point I(B) after analyzing precedent case law, the history of the privilege against self incrimination, construction by State courts of similar State Constitutional provisions in the States of Michigan, Kentucky, Florida, Louisiana and Illinois, foresees the ultimate results of the adoption of the *Murdock* decision by both Federal and State jurisdictions, as extinguishing the Privilege Against Self Incrimination guaranteed in both the Federal Constitution and the Constitutions of the various States, in fields wherein both the Federal and State Governments exercise jurisdiction, and urges reversal of the Murdock doctrine and the adoption of the "Michigan Rule" which construes the extent of the Privilege Against Self Incrimination as excusing from disclosure matters which would have a tendency to incriminate the witness in either the State or the Federal jurisdictions.

POINT II

THE FAILURE OF THE GOVERNMENT TO TENDER TO THE PETITIONER A GENERAL AMNESTY OR PARDON FOR THE UNSERVED PORTION OF AN EARLIER SENTENCE AND THE UNPAID FINE IMPOSED ON AN EARLIER FEDERAL NARCOTIC CONSPIRACY CONVICTION, CONDITIONED UPON THE PETITIONER TESTIFYING PURSUANT TO THE PROVISIONS OF THE IMMUNITY PROVISION OF THE NARCOTIC CONTROL ACT OF 1956 WAS A FATAL DEFECT OR OMISSION IN THE PROCEEDING AND WITHOUT WHICH THIS PETITIONER COULD NOT BE HELD IN CONTEMPT FOR FAILURE TO SO TESTIFY.

Point II is restricted to the facts of the present case wherein the witness at the time that the provisions of the Narcotic Control Act of 1956 were invoked against him was serving a then incompleted five year sentence and owed a $10,000. fine imposed on an earlier Federal Narcotic conspiracy conviction and it was facts constituting said prior crime that testimony was sought to be compelled of the petitioner in the present proceeding. This point after reviewing the history of immunity legislation, etc. urges that the failure of the Government prior to seeking said testimony to tender the petitioner a firm offer of a general amnesty for the unserved portion and unpaid fine imposed in the earlier Narcotic conspiracy conviction, was a fatal defect to the present contempt proceeding as without said firm offer the petitioner would be subjected to a penalty or forfeiture on account of the transaction, matter or thing concerning which it was sought to compel him to testify, despite the prohibition in the statute.

POINT III

THE PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE FAILURE OF THE LOWER COURT TO INFORM HIM AS TO THE EXTENT OF THE PURPORTED IMMUNITY GRANTED PURSUANT TO THE PROVISIONS OF THE NARCOTIC CONTROL ACT OF 1956.

POINT IV

THE SENTENCE OF PETITIONER TO TWO YEARS IMPRISONMENT FOR CONTEMPT OF COURT WAS EXCESSIVE AND AN ABUSE OF DISCRETION OF THE TRIAL COURT.

Point IV urges that it was an abuse of discretion by the Trial Court to sentence the petitioner on the contempt charge, subject to a sixty day purge clause, to two years imprisonment, said sentence to commence at the termination of a five year prison sentence that Petitioner was then serving on an earlier Federal Narcotic Conspiracy conviction, and it was to facts constituting said earlier Federal Narcotic Conspiracy that the questions giving rise to the present contempt proceeding related.

ARGUMENT

POINT I

The immunity provision of the Narcotic Control Act of 1956[3] is not coextensive with the privilege against self-incrimination (U. S. Const. Amend. V) that it seeks to replace and is therefore unconstitutional.

A

The Narcotic Control Act of 1956 Does Not Grant Immunity from Prosecution by the State

The language of the Narcotic Control Act of 1956 purporting to grant immunity reads as follows:

> "* * * But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him *in any Court*. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section." (Italics ours)

While the extent of the immunity granted has never been defined, as the Courts in passing upon contempts based upon this statute have relied on controlling case law without de-

[3] Act of July 18, 1956, C. 629, Title II, Sec. 201; 70 Stat. 574; Title 18, United States Code, Section 1406.

ciding this issue,[4] the United States Court of Appeals for the Sixth Circuit in *Tedesco* v. *United States*, 255 F. 2d 35 (U. S. C. A. 6th 1958) while affirming a contempt conviction based upon a refusal to answer questions pursuant to the immunity provisions of the aforementioned statute upon the authority of *United States* v. *Murdock*, 284 U. S. 141, 76 L. ed. 210, 52 S. Ct. 63 (1931),[5] expressed grave doubt that Congress has the power to grant immunity from state prosecution for violation of state narcotic laws. The Court of Appeals stated at page 39 as follows:

> "[4] The question must now be considered as to whether or not Congress has the constitutional power to provide the broad immunity intended. The area of congressional action in the instant case is not one pre-empted by the federal government. For example, see Commonwealth of Pennsylvania v. Nelson, 350 U. S. 497, 76 S. Ct. 477, 100 L. ed. 640. Nor is paramount authority of the Congress in safeguarding national security involved, as it was in the Ullmann case which carefully limited the scope of its opinion to that area. Whether federal jurisdiction in the field of narcotic regulation is justified on the basis of the power to tax, the power to regulate commerce, or any other constitutional grant of power, both state and federal authorities have historically exercised concurrent jurisdiction in narcotic matters. We have grave doubt that power resides with the Congress to grant immunity from prosecution in

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[4] See *In re Reina*, 170 F. Supp. 592; *United States* v. *Pagano*, 171 F. Supp. 435 and *Corona* v. *United States*, 250 F. 2d 578 (U. S. C. A. 6th 1958); cert. denied 356 U. S. 954, 2 L. ed. 2d 847, 78 S. Ct. 921; Rehearing denied 356 U. S. 978, 2 L. ed. 2d 1152, 78 S. Ct. 1140.

[5] *United States* v. *Murdock* was again before this Court after trial to review errors committed by the District Judge on the trial. See 290 U. S. 389, 78 L. ed. 381, 54 S. Ct. 223.

> state courts pursuant to state narcotic laws; but we need not consider that point * * *."

While the language of the immunity provision of the Narcotic Control Act of 1956 is an almost verbatim repetition of the language used in the Immunity Act of 1954[6] which was declared constitutional in *Ullmann* v. *United States*, 350 U. S. 422, 100 L. ed. 511, 76 S. Ct. 497 and wherein the term "in any Court" as stated in said immunity act was held to cover both federal and state jurisdictions, it does not necessarily follow that the construction placed upon the statutory wording in said act and the act presently being examined should necessarily be identical.

In *Ullmann* v. *United States, supra*, this Court sustained the sweeping immunity granted by the Immunity Act of 1954 upon the power of Congress to provide for the national defense and complementary power, U. S. Const. Article 1, Sec. 8.[7]

That the power of the Federal Government to provide for the National defense is paramount to the power of the states in that field is further emphasized in the U. S. Const. Article 1, Sec. 10, Cl. 3 which provides:

> "No State shall, without the consent of Congress, * * * or engage in War, unless actually invaded, or in such imminent danger as will not admit of delay."

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[6] Act of August 20, 1954, C. 769, Sec. 1; 68 Stat. 745; Title 18 United States Code, Section 3486.

[7] *Pennsylvania* v. *Nelson*, 350 U. S. 497, 100 L. ed. 640, 76 S. Ct. 477, decided a week after *Ullmann* v. *United States*, while covering the subject matter of preemption of a state sedition statute by a federal statute was based upon the power of Congress to provide for National defense etc. which is deemed to be so dominant in our federal system so as to preclude enforcement of state laws on the same subject matter once the federal government has acted in said field.

While the power of Congress to enact the sweeping provisions of the Immunity Act of 1954 was upheld by this Court in *Ullmann* v. *United States* (*supra*), it is of interest to note that at the time of the enactment of the said immunity act, Congress itself strongly doubted that it had the general power to ban state prosecutions for acts constituting violation of state law. In House Report No. 2606, 2 U. S. Code Congressional and Administrative News, 83rd Congress, Second Session 1954, Page 3059, wherein the House Committee on the Judiciary favorably reported the proposed bill, in discussing the question of granting immunity from State prosecution the majority committee report stated at page 3064 as follows:

> "* * * Even though the power of Congress to prohibit a subsequent State prosecution is doubtful, such a constitutional question should not prevent the enactment of the recommended bill. The language of the amendment that 'no such witness shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing, concerning which he is so compelled to testify, after having claimed his privilege against self-incrimination, to testify or produce evidence,' is sufficiently broad to ban a subsequent State prosecution if it be determined that Congress has the Constitutional power so to do."
>
> * * * * * *
>
> "In limiting the area in which the grant of immunity may be exercised to Congressional investigations and grand jury and Court proceedings relating to the interference with or endangering of the National defense or security by means of certain specific Federal crimes, the possibility of subsequent State prosecutions are reduced to a bare minimum.

> It would be a rare instance under those conditions where the compelled testimony would incriminate the witness under State statute. * * *"[8]

There was no extensive House Report on the immunity provisions of the Narcotic Control Act of 1956 which was based upon said provision of the Immunity Act of 1954.

The power of the states to legislate in the field of narcotics is an exercise by them of their police power which has been traditionally exercised by the states. There is no common law offense against the United States[9] and this power is one of the powers reserved to the States by U. S. Const. Amend. X.

The power of the United States to legislate in the field of narcotics was sustained in a five to four decision in *United States* v. *Doremus*, 249 U. S. 86, 63 L. ed. 493 (1919). In that case the majority opinion sustained the constitutionality of the Harrison Narcotic Drug Act[10] under U. S. Const. Article 1, Sec. 8, which gives Congress power "To lay and collect taxes, duties, imposts and excises, * * *". This Court stated in its majority opinion at page 94:

> "Nor is it sufficient to invalidate the taxing authority given to Congress by the Constitution that the same business may be regulated by the police power of the State. License Tax Cases, 5 Wall, supra. * * *"[11]

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[8] See also Minority Report, pages 3066, 3071.

[9] *Jerome* v. *United States*, 318 U. S. 101, 87 L. ed. 640, 63 S. Ct. 483.

[10] 38 Stat. 785, 6 U. S. Comp. Stats. 1916, Sec. 6287g.

[11] License Tax Cases, 5 Wall 462.

The minority view in *United States* v. *Doremus, supra,* was that the Harrison Narcotic Drug Act was unconstitutional as an attempt by Congress to exert a power not delegated, the reserved police power of the states.

It is to be noted that an earlier immunity statute in a field traditionally regulated by the states specifically restricts its operation to the laws of the United States. The aforementioned statute is the immunity provision of the White Slave Traffic Act of 1910[12] which reads as follows:

> "(b) In any prosecution brought under this section, if it appears that any such statement required is not on file in the office of the Commissioner of Immigration and Naturalization, the person whose duty it is to file such statement shall be presumed to have failed to file said statement, unless such person or persons shall prove otherwise. No person shall be excused from furnishing the statement as required by this section, on the ground or for the reason that the statement so required by him, or the information therein contained, may tend to criminate him or subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture under any law of the United States for or on account of any transaction, matter, or thing, concerning which he may truthfully report in such statement."

It is quite obvious that in enacting the immunity provisions of the White Slave Traffic Act of 1910, Congress recognized its inability to grant immunity with regard to

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[12] Act of June 25, 1910, C. 395, Sec. 6; 36 Stat. 826; Comp. St. 1913 Sec. 8817; now Act of June 25, 1948, C. 645; 62 Stat. 813; Title 18 United States Code, Sec. 2424(b).

police matters traditionally administered by the respective states.[13]

The Bankruptcy Act of 1898[14] after providing that a bankrupt submit to an examination concerning the conduct of his business, the cause of his bankruptcy, his dealings with his creditors and others, the whereabouts of his property and all matters which may affect the administration and settlement of his estate goes on to state:

> "but no testimony given by him shall be offered in evidence in any criminal proceeding."[15]

In *Re Nachman et al.*, 114 F. 995 (Dist. Ct., D. So. Carolina 1902) construed such language to apply only to Federal Courts and not to the State jurisdiction and the District Court permitted the bankrupt to refuse to testify on his invoking the privilege against self-incrimination for fear of a state prosecution for larceny.

It was later held by this Court in *Arndstein v. McCarthy*, 254 U. S. 71, 65 L. ed. 138, 41 S. Ct. 26, that the aforementioned provision of the Bankruptcy Act was not coextensive with the privilege against self-incrimination, U. S. Const. Amend. V, and that said privilege could be invoked

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[13] See *United States* v. *Lombardo*, 228 F. 980 (Dist. Ct. W. D. Wash. N. D. 1915).

[14] Act of July 1, 1898, C. 541, Sec. 7; 30 Stat. 548; Title 11, United States Code, Sec. 25; amended by Act of May 27, 1926, C. 406, Sec. 4; 44 Stat. 663; amended by Act of June 22, 1938, C. 575, Sec. 1; 52 Stat. 847; amended by Act of July 7, 1952, C. 579, Sec. 4; 66 Stat. 422.

[15] The above statutory language is similar to the language condemned in *Counselman* v. *Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 12 S. Ct. 195.

despite the aforementioned provisions of the Bankruptcy Act.

In *Buckeye Powder Co.* v. *Hazard Powder Co.*, 205 F. 827 (Dist. Ct. D. Conn. 1913), it was held that the immunity provision of the Sherman Anti-Trust Act[16] gives no immunity for prosecution for libel in a state court.

In *United States* v. *Lanza, et al.*, 260 U. S. 377, 67 L. ed. 314 (1922), a case arising under the Eighteenth Amendment, this Court in its decision made a statement at page 381 which is equally applicable to the present case, to wit,

> "• • • To be sure, the first section of the Amendment took from the States all power to authorize acts falling within its prohibition, but it did not cut down or displace prior state laws not inconsistent with it. Such laws derive their force, as do all new ones consistent with it, not from this Amendment, but from power originally belonging to the States, preserved to them by the Tenth Amendment, and now relieved from the restriction heretofore arising out of the Federal Constitution. This is the ratio decidendi in Vigliotti v. Pennsylvania, 258 U. S. 403.
>
> We have here two sovereignties, deriving powers from different sources, capable of dealing with the same subject matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the Amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other. • • •"

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[16] Sec. 860, Rev. Stat. U. S. (U. S. Comp. St. 1901, p. 661); also Act of Feb. 25, 1903, C. 755, Sec. 1; 32 Stat. 904; Title 15, United States Code, Sec. 32.

From the aforementioned it is quite apparent that the Narcotic Control Act of 1956 does not nor can it grant immunity from state prosecution despite the similarity of its wording with that of the Immunity Act of 1954, the reason being that it is beyond the power of Congress to legislate immunity concerning violation of state narcotic laws, a subject that has traditionally been within the police power of the state and which is protected by U. S. Const. Amendment X.

B

This Court Should Reexamine the Position That It Took in *United States* v. *Murdock*[17] With a View to Reversing the Rationale of the *Murdock* Decision Which Is Destructive of the Constitutional Privilege Against Self-Incrimination

In *United States* v. *Murdock, supra,* the rule of law was definitely settled for the first time by this Court that a witness under examination in a federal tribunal could not refuse to answer on account of probable self-incrimination under state law.

The rationale of the Murdock decision has been severely criticized as being based upon an erroneous interpretation of the English Common Law, as being inconsistent with prior decisions, and as an unrealistic adoption to our federal system of government which if universally adopted by the various states would lead to the elimination of the privilege against self incrimination guaranteed in U. S. Const. Amendment V and in the various constitutions of the respective states in respect to criminal acts that may be

[17] 284 U. S. 141, 76 L. ed. 210, 52 S. Ct. 63 (1931).

prosecuted by both the federal government and by various states.[18]

In *United States* v. *Murdock, supra,* the defendant was indicted for failure to supply information to an Internal Revenue Agent for the computation of a tax imposed under the Internal Revenue Laws of the United States, an indictable misdemeanor.[19] Murdock interposed the plea that he ought not to be prosecuted under the indictment because if he answered the questions below, he would have been compelled to become a witness against himself in violation of the 5th Amendment and caused to be subject to prosecution in the court below for violation of various laws of the United States.

The fact is that at the hearing before the Internal Revenue Bureau, Murdock, in refusing to answer, stated as follows at page 148:

> "And at the hearing appellee repeatedly stated that, in answering, 'I might incriminate or degrade myself,' he had in mind 'the violation of a state law and not the violation of a *Federal law*' . . . ."

This Court held that a demurrer to the special plea of the defendant should have been granted, holding that immunity

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[18] See J. A. C. Grant, Federalism & Self Incrimination, Part 1, *U. S.* v. *Murdock Revisited,* 4 U. C. L. A. Law Rev. 549; Part 2, *Common Law and British Empire Comparisons,* 5 U. C. L. A. Law Rev. 1; J. A. C. Grant, Immunity from Compulsory Self Incrimination in a Federal System of Government, 9 Temple Law Quarterly 57, 194 and 212; Allen, The Supreme Court, Federalism and State Systems of Criminal Justice, 8 U. of Chi. L. S. Rec. 3 (1958).

[19] Sec. 1114(a), Revenue Act of February 26, 1926; 44 Stat. at L. 116, Chap. 27; Sec. 146(a) Revenue Act of May 29, 1928; 45 Stat. at L. 835, Chap. 852.

against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him.

While this Court in deciding *United States* v. *Murdock*, *supra*, adopted the so called "English Rule," that the Common law privilege exempting witnesses from answering questions that would tend to incriminate them, does not protect witnesses against disclosing offenses in violation of the laws of another country and cited in support of that rule two English cases, to wit *Two Sicilies* v. *Willcox*, 7 State Tr. N. S. 1050, 1068 and *Reg* v. *Boyes*, 1 Best & S. 311, 330; 121 Eng. Reprint 730, it is respectfully submitted that neither of said cases supports the rationale of the decision in *United States* v. *Murdock* nor is the said "English Rule" applicable in the United States wherein we have a federal government and fifty states with overlapping and concurrent federal and state jurisdictions.

Two Sicilies v. *Willcox*, *supra*, in fact should be cited in opposition to the use of the so called "English Rule" in the United States as that decision is based upon the sole jurisdiction concept applicable to England where there is one sovereign authority and not the intertwining Federal and State jurisdictions that we have in the United States.

In *Two Sicilies* v. *Willcox* which involved a discovery proceeding in England wherein testimony was sought from agents of a revolutionary government in Sicily, the witnesses sought to invoke the privilege against self-incrimination on the grounds that their testimony might tend to expose them to prosecution in Sicily for violation of the

laws of that country. The English Court in denying the privilege in that case stated:

> " * * * It is to be observed that in such a case, in order to make the disclosure dangerous to the party who objects, it is essential that he should first quit the protection of our laws and wilfully go within the jurisdiction of the laws he has violated. * * * I am of the opinion for these reasons in the absence of all authority on the point, that the rule of protection is confined to what may tend to subject a party to penalties by our law."

Certainly the above quote requires no argument to distinguish the perils faced in the *Willcox* case from those faced by the petitioner who was called to testify before a Federal Grand Jury sitting within the State of New York.

Professor J. A. C. Grant in his Article entitled, Federalism and Self Incrimination, Part 2, Common Law and British Empire Comparisons, 5 U. C. L. A. Law Rev. 1, states that the Supreme Court of the United States in *United States* v. *Murdock, supra,* misconstrued the so called "English Rule". After reviewing the case of *Two Sicilies* v. *Willcox, supra,* and citing the distinctions hereinbefore pointed out, Professor Grant cited the later English case, *United States of America* v. *McRae,* L. R. 4 Eq. 327 (1867); affd. L. R. 3 Ch. 79 (1867). *United States of America* v. *McRae* involved a discovery proceeding in England in a suit by the United States as plaintiff against the defendant McRae, an agent of the Confederacy, concerning monies that he had been entrusted with. The defendant McRae in resisting the discovery proceeding pleaded his privilege against self incrimination and cited the forfeiture statute of the United

States. The plea of privilege was sustained. This ruling was later affirmed by the Court of Appeal.

East India Co. v. *Campbell*, 1 Ves. Sen. 246, 247; 27 Eng. Rep. 1010 (Ex. 1749), also involved a discovery proceeding in an English Court. Here the defendant in resisting the discovery proceeding interposed a demurrer claiming his privilege against self incrimination on the grounds that he was subject to punishment in India for the acts involved. The English Court sustained the privilege stating

> "for the government may send persons to answer for a crime wherever committed, that he may not involve his country; and to prevent reprisals."

It is quite clear that there is no such "English Rule" as is stated in *United States* v. *Murdock, supra*, and that each of the cases stands on its own particular set of facts, the criterion apparently being the reality of the danger of prosecution in the foreign jurisdiction and the availability of the witness to the foreign jurisdiction—the peril of the witness to prosecution.

In *Reg* v. *Boyes, supra*, the other English case cited in *United States* v. *Murdock, supra*, the Court of Queens Bench was concerned with the claim of immunity of a witness in a bribery prosecution. The witness, one of the persons who allegedly received a bribe in an election, after being called to testify as a witness, invoked his privilege against self incrimination. He was thereupon handed a pardon under the Great Seal but still claimed his privilege. The matter was referred to the Court of Queens Bench where it was held that the witness was bound to answer. That Court dismissed the fear of the witness that he would

be subject to impeachment, which was not covered by the pardon as ridiculous, stating that in all of the numerous election bribery cases there was no instance of impeachment in a similar case, and that Parliament who had instituted the bribery investigation was instrumental in procuring the pardon. Said Court further stated that an impeachment would be out of the ordinary course of the law and that the witness was not in the slightest real danger from the testimony he was being asked to give.

Again in the English cases we have the test of *peril*, whether the testimony required of the witness "would tend to place him in peril".[20]

This test of "peril from prosecution" has been likewise applied in the United States in determining whether or not the privilege applies. Said test had been applied by the Federal Courts concerning compulsory incrimination under the laws of either the Federal Government or State Governments up till the decision in *United States* v. *Murdock*, which ignores the earlier line of cases.

In *United States* v. *The Saline Bank of Virginia, etc.*, 1 Peters 100, 26 U. S. 100, 7 L. ed. 69 (1828), which involved a bill of discovery filed in the United States District Court in Virginia against certain officers and stockholders of the Saline Bank of Virginia in their private capacities to charge them for certain deposits of funds made by them, the defendants by way of demurrer filed the following plea:

> "* * * and these defendants are advised and insist, that they ought not to be compelled to discover or to set forth any matters, whereby they may impeach or

[20] See *Ex parte Reynolds*, 20 Chancery Division 294 (1882).

> accuse themselves of any offence of crime, or be liable under the laws of the Commonwealth of Virginia, to penalties and grievous fines; * * * "

The United States District Court sustained said plea and dismissed the Bill.

In affirming the District Court, the Supreme Court of the United States by Mr. Chief Justice Marshall stated at page 104 as follows:

> "This is a bill in equity for a discovery and relief. The defendants set up a plea in bar, alleging that the discovery would subject them to penalties under the statute of Virginia. The Court below decided in favor of the validity of the plea, and dismissed the bill. It is apparent, that in every step of the suit, the facts required to be discovered in support of this suit would expose the parties to danger. The rule clearly is, that a party is not bound to make any discovery which would expose him to penalties, and this case falls within it. The decree of the Court below is therefore affirmed."

Ballman v. *Fagin*, 200 U. S. 186, 50 L. ed. 433, 26 S. Ct. 212 involved a contempt arising out of the refusal of Ballman to testify and to produce certain records before a federal grand jury. Ballman on his claim of privilege feared incrimination under the laws of the State of Ohio. The Supreme Court of the United States in affirming the Circuit Court's reversal of the contempt conviction stated at page 195 as follows:

> "Not impossibly Ballman took this aspect of the matter for granted, as one which would be received by the Court without his emphasizing his own fears.

> But he did call attention to another less likely to be known. As we have said, he set forth that there were many proceedings on foot against him as party to a 'bucket shop', and so subject to the criminal law of the State in which the grand jury was sitting. According to United States v. Saline Bank, 1 Peters, 100, he was exonerated from disclosures which would have exposed him to the penalties of the State law.* * *"

Since the decision of *Counselman* v. *Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 12 S. Ct. 195, the landmark case affecting immunity legislation, the meaning of that decision has become as controversial as the constitutional privilege it sought to define.

Counselman v. *Hitchcock* involved the constitutionality of the so-called immunity provision of the Interstate Commerce Act which then read:

> "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: * * *"[21]

In declaring said act unconstitutional, this Court stated with relation to the statute at page 564:

> "* * * It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a

[21] Revised Statutes Sec. 860.

criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.* * * "

And, at page 585:

" * * * It is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect * * *

We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States."

It is the same peril guarded against in *Counselman* v. *Hitchcock, supra,* that faces this petitioner in the State jurisdiction, as it is common knowledge that the federal and state jurisdictions cooperate and exchange information and it is a real and probable danger that the federal enforcement officers, without betraying the confidence of the grand jury, would make available to the state, leads and other evidence found as a result of the petitioner's testimony which although barred to the federal government as a subject of prosecution under the immunity provision of the Narcotic Control Act of 1956, may be used by a state for prosecution of violations of states narcotic laws as said inhibition from prosecution is not binding on the states in the enforcement of their laws.[22]

[22] This point is covered in Point I(A) of this brief.

Counselman v. Hitchcock, supra, unfortunately did not pass upon whether the privilege against self incrimination, U. S. Const., Amendment V, extended to testimony concerning violations of state law, as that case dealt with preferred rates and rebates in interstate commerce, a subject exclusively within the federal jurisdiction and which did not involve violation of State laws at that time.

In *Brown* v. *Walker*, 161 U. S. 591, 40 L. ed. 819, 16 S. Ct. 644, the successor to the immunity provision of the Interstate Commerce Act stricken down in *Counselman* v. *Hitchcock* was declared constitutional by a five to four decision. This provision reads as follows:

> "No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission or in obedience to the subpoena of the Commission * * * on the ground or for the reason that the testimony or the evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding."[23]

This statute by eliminating prosecution or penalty or forfeiture evaded the infirmity of the earlier statute. However this Court in deciding *Brown* v. *Walker* at pages 606 and 607 of its opinion while inferring that said statute also ap-

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[23] Act of February 11, 1893; 27 Stat. 443.

plied to state courts, held that the alleged fear of state prosecution in that case was not a real or probable danger—that the witness was not subject to actual peril.

Mr. Justice Shiras in his dissenting opinion however refused even to make such inference holding that as Congress could not create nor denounce state penalties for crimes it could not bind State courts in relation to State criminal prosecutions and that therefore the statute was unconstitutional *per se*.

While neither *Counselman* v. *Hitchcock*, *supra*, nor *Brown* v. *Walker*, *supra*, ever elaborated on the full extent of the privilege against self incrimination as guaranteed by the U. S. Const., Amend. V., they have been quoted in *United States* v. *Murdock*, *supra*, and other decisions as authority for justifying compulsion of testimony from witnesses, where said testimony might incriminate the witness under the laws of another domestic jurisdiction.[24] It is respectfully submitted that the two aforementioned cases do not justify such assumption.

The rationale of the decision of this Court in *United States* v. *Murdock* has come under mounting criticism within recent years. In *Knapp* v. *Schweitzer*, 357 U. S. 371, 2 L. ed. 2d 1393, 78 S. Ct. 1302, Mr. Justice Black with whom Mr. Justice Douglas joined, in his dissenting opinion at page 385, stated as follows, concerning the *Murdock* decision:

> "* * * Indeed things have now reached the point, as the result of United States v. Murdock, 284 U. S.

[24] See *United States* v. *Murdock*, 284 U. S. 141, 76 L. ed. 210, 52 S. Ct. 63; *Jack* v. *Kansas*, 199 U. S. 372, 50 L. ed. 234, 26 S. Ct. 73; *Feldman* v. *United States*, 322 U. S. 487, 88 L. ed. 1408, 64 S. Ct. 1082.

> 141, 76 L. ed. 210, 52 S. Ct. 63, 82 ALR 1376, Feldman, and the present case, where a person can be whipsawed into incriminating himself, under both state and federal law even though there is a privilege against self-incrimination in the Constitution of each. Cf. Irvine v. California, 347 U. S. 128, 98 L. ed. 561, 74 S. Ct. 381; United States v. Kahriger, 345 U. S. 22, 97 L. ed. 754, 73 S. Ct. 510. I cannot agree that we must accept this intolerable state of affairs as a necessary part of our federal system of government."

In *Ullmann* v. *United States*, 350 U. S. 422, 100 L. ed. 511, 76 S. Ct. 497, the *Murdock* decision was ignored despite the fact that the Solicitor General specifically cited it in his brief and the question in point called for the application of that decision, if in fact it still is the law.

Feldman v. *United States*, 322 U. S. 487, 88 L. ed. 1408, 64 S. Ct. 1082 and *Knapp* v. *Schweitzer*, *supra*, which involve the converse of *United States* v. *Murdock*, *supra*, likewise ignore the decision of *United States* v. *Murdock*, except for the aforementioned dissent in *Knapp* v. *Schweitzer*, *supra*.

The Courts of the State of Michigan hold that the privilege against self incrimination guaranteed under the constitution of the State of Michigan which contains a provision similar to U. S. Const., Amend. V[25] exonerates from

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[25] Constitution of the State of Michigan of 1908
Article 2, Declaration of Rights

> * * * Self-Incrimination; Due process of Law. Sec. 16. No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.

disclosure despite a state immunity statute whenever there is a probability of prosecution in state or federal jurisdictions.

In *People* v. *Den Uyl*, 29 N. W. 2d 284, 318 Mich. 645, 2 A. L. R. 2d 625, which involved an appeal by the state from a ruling of the Court below upholding the claim of privilege by the witness in refusing to testify on the grounds of self incrimination under the federal law despite a statutory grant of immunity under the laws of the State of Michigan, the Supreme Court of Michigan in upholding the claim of privilege stated at page 287 as follows:

> "* * *, and in the Cohen case we quoted from the Watson case the following [295 Mich. 748, 295 N. W. 482]: 'We are of the opinion that the privilege against self-incrimination exonerates from disclosure whenever there is a probability of prosecution in State or federal jurisdictions.'
>
> We are aware that holdings at variance with the above can be found in other jurisdictions, including holdings in the Federal courts. Nonetheless we adhere to our previous holdings, not alone on the grounds of established precedent, but rather that the holdings in the above cited cases are essential to render fairly effective the quoted State constitutional provision against self-incrimination. It seems like a travesty on verity to say that one is not subjected to self-incrimination when compelled to give testimony in a State judicial proceeding which testimony may forthwith be used against him in a Federal criminal prosecution. And it is self-evident that immunity granted under a State statute would be of no avail in a Federal prosecution.* * *"

See also *In re Watson*, 291 N. W. 652, 293 Mich. 263; *In re Schnitzer*, 295 N. W. 478, 295 Mich. 736; *In re Ward*, 295 N. W. 483, 295 Mich. 742 and *In re Cohen*, 295 N. W. 481, 295 Mich. 748.

Following the lead of the State of Michigan in adopting the so called "Michigan Rule" as enunciated in *People* v. *Den Uyl*, *supra*, are the States of Kentucky,[26] Florida,[27] and Louisiana.[28] In the Louisiana case the "Michigan Rule" was applied to testimony that would tend to incriminate the witness under the laws of a sister state, California, the test being—actual peril of prosecution.

The State of Illinois by statute has adopted the Michigan Rule. See *People* v. *Burkert*, 131 N. E. 2d. 495, 7 Ill. 2d. 506.[29]

In recent years many of the lower Federal courts while giving lip service to *United States* v. *Murdock*, *supra*, tend to circumvent said decision whenever possible on dubious distinctions.

In *Marcello* v. *United States*, 196 F. 2d. 437 (U. S. C. A. 5th, 1952) which involved a contempt of the United States

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[26] *Commonwealth* v. *Rhine*, 303 S. W. 2d 301 (Ct. of Appeals, Ky. 1957).

[27] *State* v. *Kelly*, 71 So. 2d 887 (Supreme Ct. of Florida 1954).

[28] *State ex rel. Doran* v. *Doran et al.*, 39 So. 2d 894, 215 La. 151 (Supreme Ct. of Louisiana 1949).

[29] Illinois Immunity Statute; Illinois Revised Statutes 1953, Chapter 38, Paragraph 580A, states that the Court shall deny the Attorney General's motion to compel a witness to testify under a grant of immunity "if it shall reasonably appear to the court that such testimony or evidence, documentary or otherwise would subject such witness to an indictment, information or prosecution * * * under the laws of another State or of the United States; * * *."

Senate pursuant to Title 2, U. S. C. A. Section 192, arising out of the witness invoking his privilege against self incrimination before Senator Kefauver's Crime Investigation Committee, a conviction for contempt was reversed upon the questionable grounds that the witness upon refusing to testify for fear of self incrimination when questioned about purely state crimes such as murder, may have had fear of incriminating himself of a federal crime that neither the committee nor the lower court could have known about *i.e.* Title 18 United States Code, Sections 2 and 1073 which involve flight to avoid giving testimony as a witness in a state, and aiding and abetting such flight.

The United States Court of Appeals for the Fifth Circuit in *Marcello* v. *U. S., supra,* in acknowledging that it was bound by the Supreme Court's decision in the *Murdock* case and while hoping that the Court reconsider its decisions in *United States* v. *Murdock* and *United States* v. *Feldman,* commented ironically at page 442, as follows:

> "The doctrine is so strongly entrenched that it appears as futile to protest as it is to expect an individual to feel that his constitutional privilege has been guarded because the penetentiary into which his answers may land him is under the supervision of the state instead of the federal government. * * *"

In *United States* v. *DiCarlo,* 102 F. Supp. 597 (United States District Court, N. D. Ohio E. D. 1952)[30] which also involved a prosecution for a contempt in violating Title 2, Section 192, U. S. C. A. arising out of the witness invoking his constitutional privilege against self incrimination be-

[30] See also *United States* v. *Licavoli,* 102 F. Supp. 607; *United States* v. *Aiuppa,* 102 F. Supp. 609.

fore the Senate Committee investigating crime, the United States District Court sitting without a jury found the defendant not guilty of contempt. In its opinion at page 602 the District Court asked itself the question:

> "There remains for determination the question whether the Committee, in the exercise of such powers, was required to respect the immunity of witnesses against self-incrimination for violations of state laws as well as the immunity of witnesses against disclosures that might subject them to prosecution by the federal government."

The Court went on to state at page 603 as follows:

> "* * * But in determining the rights of a witness who is interrogated about violations of state law by a federal agency, there is presented the serious and important question whether the immunity of the Fifth Amendment ought not to be extended to afford the witness protection against disclosures that might subject him to prosecutions under state law. That question was not decided in United States v. Murdock, supra, and, as will be shown, the Supreme Court observed that the Murdock case presented no question involving matter of 'state concern.' If the immunity of the Fifth Amendment can not thus be extended, the questions is—Does the federal government, investigating state crimes, possess the power to deny witnesses their right to immunity against self-accusation under the constitutions of the States?"

And at page 606:

> "[18] The foregoing considerations lead inescapably to the conclusion that the defendant is entitled to immunity against disclosures that might incriminate him of violations of state law as well as immunity

against self incrimination of a federal crime. If this conclusion can not be said to rest upon the principle of state supremacy in the domain of reserved powers, as hereinbefore discussed it finds ample support in the principle that the Fifth Amendment operates as a restraint upon federal officers investigating state crimes."

It is quite apparent that with the ever expanding assumption of jurisdiction by federal agencies and enforcement officers in areas formerly within the exclusive domain of the states, that the natural culmination of the doctrines expounded by *United States* v. *Murdock, supra,* and *Feldman* v. *United States, supra,* will be to extinguish the privilege against self incrimination that is guaranteed in the constitutions of the United States and of the individual states in the rapidly expanding fields where both the federal government and the respective states both exercise jurisdiction.[31]

Professor Grant, in his article, Federalism and Self Incrimination, Part 2, Common Law and British Empire Comparisons, 5 U. C. L. A. Law Rev. 1, 25 expresses the fear that the *Murdock* and *Feldman* decisions constitute a grave threat to the privilege against self incrimination guaranteed in the Constitution of the United States and in the various state constitutions and in conclusion he quotes Mr. Justice Black's dissent in *Irvine* v. *California,* 347 U. S. 128, 98 L. ed. 561, 74 S. Ct. 381, wherein the following statement appears at page 140:

"I think the Fifth Amendment of itself forbids all federal agents, legislative, executive and judicial to

[31] See Allen, The Supreme Court, Federalism, and State Systems of Criminal Justice, 8 U. of Chi. L. S. Rec. 3 (1958).

> force a person to confess a crime; forbids the use of such a federally coerced confession in any court, state or federal; and forbids all federal courts to use a confession which a person has been compelled to make against his will."[32]

The overruling of the *Murdock* and the *Feldman* cases it is submitted[33] and the adoption of the "Michigan Rule" in its place will return to the privilege against self incrimination the meaning that it had at the time the Constitution was adopted—the literal meaning of the words to wit—No PERSON * * * SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF—

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[32] See *Bram* v. *United States*, 168 U. S. 532, 543, 42 L. ed. 568, 18 S. Ct. 183.

[33] State Immunity Statutes and The Scope of the Privilege Against Self Incrimination, 26 University of Chi. Law. Rev. 164, as a solution of the problem raised by the *Murdock* and *Feldman* decisions advises (1) the overruling of said cases, (2) acceptance of the Michigan Rule and (3) voluntary extension of immunity by prosecuting sovereign so that witness can not show threat of prosecution.

POINT II

The failure of the Government to tender to the petitioner a general amnesty or pardon for the unserved portion of an earlier sentence and the unpaid fine imposed on an earlier federal narcotic conspiracy conviction,[34] conditioned upon the petitioner testifying pursuant to the provisions of the immunity provision of the Narcotic Control Act of 1956 was a fatal defect or omission in the proceeding and without which this petitioner could not be held in contempt for failure to so testify.

This is a case of concededly novel instance[35] wherein the petitioner who at the time he invoked his constitutional privilege against self incrimination after having been ordered to testify before a federal grand jury pursuant to the terms of a federal statute purporting to grant immunity, was then serving a prison sentence imposed by the same federal district court, for the crime of conspiracy to violate the Narcotic Laws of the United States[36] and wherein the

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[34] For details of the earlier Federal Sentence that petitioner was then serving see footnote 2 on page 7 of this brief.

[35] The United States Attorney for the Southern District of New York in his brief below to the United States Court of Appeals for the Second Circuit conceded that this is a case of novel instance on page 12 of said brief wherein he stated:

> "None of the federal cases cited by the Appellant's or in the Government's brief deals with a witness who has already been convicted of the crime concerning which he was being compelled to testify. However several New York State cases have dealt specifically with the problem * * *" (Citing cases).

[36] The earlier conviction of the petitioner for conspiracy to violate the Narcotic laws of the United States resulted after a trial. This petitioner did not testify in said case.

subject matter of the grand jury investigation concerned facts constituting said earlier crime (R. 2-7, 27).

While the ordinary rule is that once a person is convicted of a crime, he no longer has the privilege against self-incrimination as he can no longer be incriminated by his testimony about said crime (See *United States* v. *Gernie*, 252 F. 2d 664 (U. S. C. A. 2d 1958); cert. denied 356 U. S. 968, 2 L. ed. 2d 1073, 78 S. Ct. 1006), this rule does not apply in conspiracy convictions which by their very nature may leave the defendant subject to prosecution for the substantive crimes that he has been convicted of conspiring to violate.[37] This fact was in effect conceded by the government when it chose to invoke the immunity provisions of the Narcotic Control Act of 1956 with respect to the petitioner herein.

The pertinent provisions of the act in question are as follows:

> "* * * But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on ac-

[37] This petitioner still faces peril of federal prosecution for federal substantive violations of Title 21, United States Code, Sections 173 and 174 (sale and possession of Narcotics), Title 26, United States Code, Section 2553(a) (purchase or sale of Narcotics not in original stamped package), 2554(a) (sale of narcotics without written order), and 2606; also under the Penal Law of the State of New York, Sec. 580 (Conspiracy), Sec. 260 (attempt to commit crime), Secs. 1751 and 1752 (possession of narcotics), plus the criminal provisions of the Internal Revenue Laws of the United States, Title 26 U. S. C. A.

The statute of limitations in federal criminal offenses, not capital, is set forth in Title 18, United States Code, Section 3282 and is for 5 years. For criminal offenses arising under the Internal Revenue Act it is six years, Title 26, United States Code, Section 6531.

The statute of limitations for violation of the penal laws of the State of New York is for five years—New York State Code of Criminal Procedure, Sec. 142.

> count of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination to testify or produce evidence, • • •."

The petitioner on being summoned before the grand jury claimed his privilege against self incrimination (R. 2-7, 8, 9, 11, 15). Thereafter he was ordered to testify before said grand jury pursuant to the immunity provision of the Narcotic Control Act of 1956 (R. 10-11, 12, 14, 15), however he was not offered an amnesty or pardon for the past federal offense conditioned upon his so testifying. It is this failure on the part of the government to grant an amnesty or pardon subject to the condition that the witness testify as ordered, that should necessitate a reversal of the contempt order *arguendo* the immunity provision of the Narcotic Control Act of 1956 is constitutional.

The immunity provision of the Narcotic Control Act of 1956 with certain exceptions not now in point, follows generally the language used in the Act of February 11, 1893, C. 83; 27 Stat. 443 which was approved by this Court in *Brown* v. *Walker*, 161 U. S. 591, 40 L. ed. 819, 16 S. Ct. 644. In *Brown* v. *Walker*, this Court defined the power of Congress to pass immunity statutes as coming within the scope of its power to pass acts of general amnesty, stating at page 601 as follows:

> "• • • The act of Congress in question securing to witnesses immunity from prosecution is virtually an act of general amnesty, and belongs to a class of legislation which is not uncommon either in England (2 Taylor on Evidence, Sec. 1455, where a large number of similar acts are collated), or in this country. Although the Constitution vests in the President

> 'power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment,' *this power has never been held to take from Congress the power to pass acts of general amnesty, and is ordinarily exercised only in cases of individuals after conviction,* although as was said by this Court in Ex parte Garland, 4 Wall 333, 380, 'it extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.' * * * " (Italics ours)

It is quite obvious that in *Brown* v. *Walker, supra,* the Court upheld the immunity provision in the Interstate Commerce Act on the basis of the power of Congress to grant general amnesty for past offenses.[38]

The term "amnesty" has been defined as "an act of oblivion for past offenses, granted by the Government to those who have been guilty of any neglect or crime usually upon condition that they return to their duty within a certain period * * *."[39]

"Amnesty" has also been defined as an act of pardon or oblivion by which crimes against the Government are so obliterated that they can never be brought into charge.[40]

The closest cases in point that the writer has been able to find are the amnesty and pardon cases arising after the Civil War with respect to earlier forfeiture statutes against sympathizers of the Confederacy.

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[38] See *Matter of Rouss,* 116 N. E. 782, 221 N. Y. 81, 87.

[39] Bouvier's Law Dictionary, Vol. 1, Rawles 3rd Ed. 1914, p. 189.

[40] Dictionary of English Law by Earl Jowitt, p. 114.

Knote v. *United States*, 95 U. S. 149, 24 L. ed. 442 was a case wherein Knote petitioned the United States for the return of the proceeds of the sale of real property that was seized from him pursuant to the Confiscation Act of 1862 by reason of his treason and rebellion against the United States. By proclamation dated December 25, 1868, the President of the United States granted a general pardon and amnesty to a class of persons that included Knote. Knote then petitioned for the return of the proceeds of the sale of the confiscated real property that formerly belonged to him. The petition was dismissed and the case finally came before this Court which affirmed the lower Court. In its decision in *Knote* v. *United States, supra*, this Court after reviewing the history of the terms "pardon" and "amnesty" held that the distinction between the two terms is not recognized in our law as the term "amnesty" is not used in the Constitution,[41] and that they are now used interchangeably and have the same effect. This Court stated at page 154 the rule with respect to the pardon power of the President concerning the return of condemned property as follows:

> "• • • However large, therefore, may be the power to pardon possessed by the President, and however extended may be its application, there is this limit to it, as there are to all his powers,—it can not touch moneys in the treasury of the United

[41] While in *Knote* v. *United States, supra*, the term pardon and amnesty related to the term "pardon" as used in our constitution, there is a very real difference between the terms pardon and amnesty in application. See *Burdick* v. *United States*, 236 U. S. 79, 59 L. ed. 476, 35 S. Ct. 267 where it was held that a witness could reject a presidential pardon and thus be permitted to invoke his privilege against self incrimination with respect to matters covered by the proposed pardon.

States, except expressly authorized by Act of Congress. The Constitution places this restriction on the pardoning power.

Where, however, property condemned, or its proceeds, have not thus vested, but remain under the control of the Executive, or of officers subject to his orders, or are in the custody of judicial tribunals, the property will be restored or its proceeds delivered to the original owner, upon his full pardon. The property and the proceeds are not considered as so absolutely vesting in third parties or in the United States as to be unaffected by the pardon until they have passed out of the jurisdiction of the officer or tribunal. The proceeds have thus passed when paid over to the individual entitled to them, in the one case, or are covered into the treasury in the other."

Ex parte Garland, 4 Wall 333, 71 U. S. 333, was another pardon and amnesty case arising after the Civil War, however unlike *Knote* v. *United States, supra,* which involved condemned property, the *Garland* case involved the right of Garland to practice as an attorney and counsellor at law before the Courts of the United States.

In *Ex parte Garland, supra,* Garland, who served as a representative of the State of Arkansas and later as a Senator from Arkansas in the Confederacy during the Civil War received a full pardon and amnesty from the President of the United States during July 1865. Garland then produced this pardon and sought permission to continue to practice as an attorney and counsellor at law before the Supreme Court of the United States without his taking the oath required by the then amended second rule of the Court which required the oath prescribed by the Act

of January 24, 1865, that the deponent has never voluntarily borne arms against the United States since he has been a citizen; has not given voluntary aid or encouragement to persons in armed hostility thereto; has never sought, accepted, or attempted to exercise any office under any authority or pretended authority in hostility to the United States; has not given voluntary support to any pretended government, authority or power, within the United States, hostile or inimical thereto; and that he will support and defend the Constitution of the United States.

In granting Garland's petition and rescinding the rule of the Court requiring said oath, this Court stated at page 381:

> "The pardon produced by the petitioner is a full pardon 'for all offenses by him committed, arising from participation, direct or implied, in the Rebellion', and is subject to certain conditions which have been complied with. The effect of this pardon is to relieve the petitioner from all penalties and disabilities attached to the offense of treason, committed by his participation in the Rebellion. So far as that offense is concerned, he is placed beyond the reach of punishment of any kind. But to exclude him, by reason of that offense, from continuing in the engagement of a previously acquired right, is to enforce a punishment for that offense notwithstanding the pardon. If such exclusion can be effected by the extraction of an expurgatory oath covering the offense, the pardon may be avoided, and that accomplished indirectly which can not be reached by direct legislation. It is not within the power of Congress thus to inflict punishment beyond the reach of executive clemency. From the petition, therefore, the oath required by the act of January 24, 1865, could not be exacted, even if that act were not subject to any other objection than the one thus stated."

The aforementioned Civil War pardon and amnesty cases while civil in nature are the closest cases in point to the subject matter presented in the present case[42] and the reasoning followed in said aforementioned decisions is equally applicable to the present case, a criminal matter.

Certainly the unserved portion of the prison sentence and the unpaid fine imposed in the earlier conspiracy conviction was within the scope of the power to pardon as enunciated in *Knote* v. *United States, supra;* and a general pardon or amnesty would certainly affect them under the reasoning of *In Re Garland, supra.*

It is self apparent also that the term general amnesty applies to the act or series of acts as such and all crimes that flow therefrom, as any so called amnesty applicable only to one specific crime where the act involved could be construed to constitute multiple crimes would be an empty gesture.

No doubt the clarity of the meaning of the terms pardon and amnesty in the field of criminal law prior to the adoption of immunity statutes such as the statute under attack herein, accounts for the lack of case law in the field.

It is apparent from the wording of the immunity provision of the Narcotic Control Act of 1956, from the history of immunity legislation and from the nature of immunity legislation in general, that the language of the aforementioned statute looks to both the future and to the past.

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[42] While *Knote* v. *United States, supra,* and *In re Garland, supra,* dealt with the Presidential pardon, U. S. Const. Art. 2, Sec. 2, Cl. 1, it was held that the ultimate effect of both pardon and amnesty is the same although in application they vary. See also *Burdick* v. *United States, supra.*

In enacting immunity legislation, Congress faces a very grave responsibility. It is incumbent upon Congress to forsee all of the implications involved in enacting such legislation. The problems and perils faced by Congress in enacting immunity legislation were elaborated on in House Report 2606, 2 U. S. Code Congressional and Administrative News, 83rd Congress, Second Session 1954, P. 3059, 3062, 3064 wherein the House Committee on the Judiciary, in favorably reporting out the then proposed Immunity Act of 1954 cited as an ill advised example of legislation, the Immunity Act of 1857, 11 Stat. 155 which resulted in an unforeseen "immunity bath."

Whereas in the past it has been held that testimony could not be compelled of an unwilling witness in violation of his privilege against self incrimination by forcing upon him a presidential pardon[43] nor could the Court on its own grant immunity[44] the present immunity statute is an act of the legislature which requires the concurrence of the executive (Attorney General) and the judiciary in the grant of immunity. In the ordinary case that should be sufficient.

Likewise in the ordinary case where a witness who is imprisoned pursuant to a judgment of conviction is questioned concerning facts that constitute the crime he was convicted of, it has been held that he must testify concerning said facts as he can no longer be incriminated[45] hence no immunity statute is necessary to compel said testimony.

The petitioner herein, at the time that the government sought to compel his testimony before a federal grand jury

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[43] See *Burdick* v. *United States*, *supra*.

[44] See *Isaacs* v. *United States*, 256 F. 2d 654 (U. S. C. A. 8th, 1958).

[45] *United States* v. *Gernie*, *supra*.

concerning violations of the Narcotic Laws of the United States was serving a sentence and owed a fine of ten thousand dollars imposed by the United States District Court for the crime of conspiracy to violate the Narcotic Laws of the United States, and it is facts that constituted said crime and its constituent substantive crimes that the Government sought to elicit from the petitioner by recourse to the immunity provisions of the Narcotic Control Act of 1956.

At the time the immunity provisions of the Narcotic Control Act of 1956 were invoked the petitioner already had been convicted of the nebulous crime of conspiracy, a crime wherein conviction on one set of facts alone does not protect from further jeopardy in the same jurisdiction, as prosecution for violations of the substantive crimes based upon the facts constituting the conspiracy is possible and often probable.

It is such a situation that either was overlooked by Congress in enacting the statute in question, or wherein by its very wording the said statute was meant to apply retrospectively. In either event the result is the same. It was incumbent upon the government to tender the petitioner a general pardon or amnesty in express language excusing him from further service of the earlier sentence and remitting the fine, said pardon or amnesty being conditioned upon the petitioner testifying truthfully pursuant to the immunity provision of the Narcotic Control Act of 1956 and in the absence of such firm offer, the petitioner could not be compelled to testify.

The ease by which waiver of the constitutional privilege could be implied and the particular wording of the statute

in question which would lead an unwary witness into waiving his privilege[46] called for extreme caution on the part of a witness, in this case the petitioner, and certainly the wording of the order of the District Court of December 17, 1958 (R. 10, 11) which ordered the petitioner herein to testify pursuant to the provisions of Title 18, United States Code, Section 1406, did nothing to allay petitioner's fears. In any event said order was not a firm commitment on the part of the government of a general pardon or amnesty conditioned upon petitioners testifying truthfully before a grand jury pursuant to the immunity provisions of the Narcotic Control Act of 1956,[47] and therefore said order was not a proper basis upon which to bottom a contempt proceeding in the face of a claim of privilege against self incrimination as it did not grant this petitioner immunity

[46] Both the Immunity Act of 1954, Act of Aug. 20, 1954, C. 769, Sec. 1; 68 Stat. 745; Title 18, United States Code, Sec. 3486 and the Immunity Provision of the Narcotic Control Act of 1956; Act of July 18, 1956, C. 629, Title II, Sec. 201; 70 Stat. 574; Title 18, United States Code, Sec. 1406, contain the proviso that the witness must give testimony or produce evidence, *after having claimed his privilege against self incrimination*, before immunity is conferred. It appears that a witness ordered to testify pursuant to said statutes who fails to claim his privilege against self incrimination before so testifying or producing evidence obtains no immunity.

[47] It appears that the only procedure for petitioner to follow in order to protect his rights was to continue to refuse to testify and seek recourse to the highest court in the absence of a firm offer of pardon or amnesty in exchange for his testimony, as once the testimony is given in the absence of said offer the harm is done and petitioner has no recourse as the courts do not infer amnesty where none is given. See *Hunt* v. *Lane*, 116 N. Y. S. 990, 132 App. Div. (N. Y.) 406; aff'd 89 N. E. 1108, 196 N. Y. 520. (Did not involve a contempt but was a Habeas Corpus proceeding wherein relator sought freedom from prison sentence because of fact that he subsequently testified before a grand jury. See also *People* v. *Fine*, 19 N. Y. S. 2d 275 (Supreme Ct. Orange County 1940).)

coextensive with the constitutional privilege it sought to replace and therefore was unconstitutional in its application to this petitioner and no contempt proceeding could therefore be based on a refusal to obey said order.

POINT III

The petitioner was denied due process of law by the failure of the lower Court to inform him as to the extent of the purported immunity granted pursuant to the provisions of the Narcotic Control Act of 1956.

This point is based directly on the prior Points herein and arises out of the failure of the District Court to instruct the petitioner as to his rights to wit: To fully and fairly inform petitioner as to the extent of the immunity conferred by the statute (Point I). See *People* v. *Brayer*, 179 N. Y. S. 2d 248, 251, 6 App. Div. 2d 437; and the effect of petitioner's testimony pursuant to the provisions of Title 18, United States Code, Sec. 1406 upon the unserved portion of the sentence and unpaid fine of ten thousand dollars imposed upon petitioner on the earlier conviction for conspiracy to violate the Narcotic Laws of the United States (Point II).

POINT IV

The sentence of petitioner to two years imprisonment for contempt of court was excessive and an abuse of discretion of the Trial Court.

The sentence of the Court below (R. 34) and the judgment of conviction entered thereon (R. 36, 37), based upon an alleged contempt of court set forth in these proceedings, wherein the petitioner, under claim of constitutional right, refused to answer certain questions concerning matters upon which a prior Federal Narcotic conspiracy conviction against him was based and for which he was then serving a five year prison sentence plus a $10,000 fine (R. 27), was excessive where said sentence ordered, that subject to a sixty day purge clause, the petitioner be imprisoned for an additional term of two years, said sentence to commence at the expiration of the prison term that the petitioner was then serving for the earlier offense. If not double jeopardy, such a sentence amounts to double punishment for the same crime and was an abuse by the lower Court of its discretion and is subject to review by this Court. See *Worden* v. *Searles*, 121 U. S. 14, 30 L. ed. 853, 7 S. Ct. 814.

CONCLUSION

The conviction of the petitioner should be reversed and the matter remanded to the District Court with directions that the Government's motion to punish petitioner for contempt be denied.

Respectfully submitted,

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